

STATE OF MICHIGAN
COURT OF APPEALS

SHELLY M. KRASTES,

Plaintiff-Appellee,

and

AUTO CLUB OF MICHIGAN,

Intervening Plaintiff,

v

HASELEY CONSTRUCTION CO., INC.,
RELIANCE INS. CO., and MICHIGAN
PROPERTY & GUARANTY ASSN.,

Defendants-Appellants,

and

GRAYCOR SERVICES, AMERICAN RISK
FUNDING INS. CO., FLUOR CORP., and
CONTINENTAL CASUALTY CO.,

Defendants.

UNPUBLISHED

April 10, 2008

No. 276545

WCAC

LC No. 02-000351

Before: Zahra, P.J., and Whitbeck and Beckering, JJ.

PER CURIAM.

Defendants Haseley Construction Company and its workers' compensation insurers, Reliance Ins. Co., and Michigan Property & Guaranty Assn., appeal by leave granted the opinion and order of the Workers' Compensation Appellate Commission (WCAC) that reversed the magistrate's order stopping the payment of disability benefits to plaintiff Shelly Krastes. We reverse the WCAC and reinstate the magistrate's order granting defendants' petition to stop payment of benefits.

I. Basic Facts And Procedural History

Haseley Construction employed Krastes as a heavy equipment operator on a construction site. This work involved repeated movement of her arms, legs, and neck. Krastes applied for

disability benefits based on an injury that occurred on June 15, 1998, when she was thrown from a “port-a-john” that was apparently struck by a piece of equipment. She immediately suffered pain in her neck, right arm, and shoulder. Krastes stopped working on July 8, 1998, because of the pain. She was treated with physical therapy and medication, and released to work without restrictions in February 1999. She began working for another employer as a forklift operator and suffered increased pain in her neck, shoulder, and arm. These symptoms progressed until Krastes could no longer work as a heavy equipment operator. Krastes subsequently began receiving psychological treatment for depression.

Krastes applied for disability benefits based on physical and psychological disability. In July 2002, the magistrate granted Krastes an open award of disability benefits. The magistrate found that Krastes sustained a disabling physical injury on June 15, 1998, while employed by Haseley Construction, specifically finding that the injury resulted in a cervical strain or sprain that developed into a chronic pain disorder and rendered her unable to return to work as a heavy equipment operator. The magistrate’s findings were based on Krastes’ testimony, medical records, and deposition testimony from Krastes’ expert physician, Dr. Jacquelyn Lockhart. Although the magistrate found Krastes disabled based on the injury to her neck and shoulders, she also found that Krastes had failed to prove a psychiatric disability.

Defendants appealed the magistrate’s July 2002 order to the WCAC, which affirmed the magistrate’s findings but remanded the matter for the magistrate to evaluate disability and wage loss according to *Sington v Chrysler Corp.*¹ In January 2005, the magistrate found Krastes disabled under *Sington*.

In August 2004, Haseley Construction filed a petition to stop paying Krastes disability benefits based on the argument that her injuries had healed such that she was no longer physically disabled from working. Haseley relied on an examination of Krastes by Dr. Paul Drouillard, DO., and further supported its position with videotapes of Krastes taken by a private investigator. Those tapes apparently showed Krastes engaged in driving her truck and other activities. Dr. Drouillard testified at deposition that he examined Krastes on August 7, 2004, and found no spasm or trigger points, restricted motion, weakness, or atrophy of the cervical spine. He also found no weakness, instability, or impingement of the rotator cuff. Dr. Drouillard reviewed x-rays and MRI films of the affected areas and found no objective evidence to support Krastes’ complaints of pain or a work-related injury. Dr. Drouillard concluded that Krastes could return to work without restrictions.

Krastes responded, relying on the deposition testimony of Dr. Keith Barbour, who started treating her in November 2000. Dr. Barbour’s initial diagnosis was that Krastes suffered from somatic dysfunction, myofascial pain, C-7 radiculopathy, rotator cuff syndrome, sympathetic pain syndrome, and stress syndrome. Since that time, Dr. Barbour dropped his diagnoses of rotator cuff syndrome, sympathetic pain syndrome, and thoracic outlet syndrome. Dr. Barbour maintained that Krastes still suffered from somatic dysfunction and myofascial pain. He explained that Krastes’ condition was essentially a soft tissue injury and that objective studies

¹ *Sington v Chrysler Corp*, 467 Mich 144; 648 NW2d 624 (2002).

were within normal limits. Dr. Barbour noticed significant improvement in Krastes' ability to relax her arm and neck muscles, and believed that her condition was slowly improving over time. However, Dr. Barbour found that Krastes still showed symptoms consistent with his earlier findings and maintained the same restrictions on her that he had imposed in 2000.

The very same magistrate who had originally found Krastes to be disabled reviewed the competing medical evidence and the videotape, and, relying on Dr. Drouillard's testimony, concluded that Krastes was no longer disabled as a result of her 1998 injury, explaining as follows:

I find the evidence establishes the plaintiff's disability ended as of August 7, 2004, the date of Dr. Drouillard's examination. In reaching my conclusion, I find the testimony of Dr. Drouillard to be more persuasive than that of Dr. Barbour, and I rely on his findings and conclusions. I note that plaintiff sustained a soft issue injury almost seven years prior to this hearing. All of objective studies have been negative and even Dr. Barbour conceded that many of his initial diagnoses have resolved. He also conceded that plaintiff's ongoing complaints were significantly affected by her stress and emotional problems. I find it significant that Dr. Barbour's diagnoses are based, in part, on plaintiff's subjective complaints, as was his testimony as to the necessity and extent of physical restrictions. However, his testimony as to plaintiff's physical restrictions was not consistent with her activity demonstrated on the videotape and thus causes this magistrate to question the reliability of his conclusions. While plaintiff does not perform any significant physical activity, she is shown getting into her truck and turning her head without any apparent hesitation, activities that Dr. Barbour felt would be difficult for plaintiff to perform. Having considered the testimony of both medical experts, I find Dr. Drouillard's findings and opinions more persuasive than those of Dr. Barbour and I accept his testimony as to the lack of any ongoing physical limitation. Accordingly, defendant is entitled to recoup any benefits paid to plaintiff after August 7, 2004, the date disability ended.

The magistrate granted Haseley Construction's petition to stop payment of benefits in June 2005.

Krastes appealed the magistrate's June 2005 order to the WCAC, arguing, in pertinent part, that the magistrate's conclusion that Krastes was no longer disabled was not supported by competent, material, and substantial evidence. The WCAC reversed the magistrate's order, rejecting Dr. Drouillard's testimony that Krastes was no longer disabled on the ground that he had only examined her in August 2004. Specifically, because Dr. Drouillard had not examined Krastes at the time she was originally found to be disabled, the WCAC concluded that "he had no understanding of what plaintiff's condition had been at the time she was found to be disabled" and "was unable to explain how, if at all, her condition had changed." The WCAC criticized the magistrate's rejection of Dr. Barbour's testimony, stating as follows:

The magistrate rejected Dr. Barbour's opinions, finding them to be unreliable. Interestingly, Dr. Barbour provides the only evidence of improvement, or "change of condition," in this record. However, even though Dr. Barbour testified that he is seeing gradual improvement in plaintiff's emotional condition, he does not believe that she has recovered sufficiently from a physical

standpoint, to be able to return to her former work as a heavy equipment operator. Dr. Barbour's testimony does not provide the requisite evidence, either.

The WCAC also found that the magistrate had misinterpreted the private investigator's videotape, explaining:

While we usually defer to the magistrate on issues of credibility, we do not necessarily defer on review of exhibits themselves. This is because the magistrate is in no better position to review or interpret an exhibit which comes to the Commission in the same form. (Unlike the magistrate's ability to observe the demeanor of live witnesses.) The magistrate stated that plaintiff's activity on the videotape was not consistent with her testimony or the physical restriction testified to by Dr. Barbour. Our review of the videotape does not leave us with the same impression. Dr. Barbour and plaintiff testified that she could not return to her former work as a heavy equipment operator because of the climbing involved, and also the repetitive head turning. The video does show plaintiff turning her head to fasten her seatbelt, but it is not a repetitive motion. It is also not a particularly swift motion. The video does show that plaintiff wears her seatbelt abnormally, consistent with her testimony. The video also shows plaintiff moving very slowly. It shows her watching her mother unload bags into a truck, rather than pitching in to help. She explained that she could not lift the bags to help. There is nothing in this record to contradict her explanation, and we find that segment of the video to be of particular significance in supporting her testimony of ongoing problems.

Defendants now appeal the WCAC's order.

II. Physical Impairment

A. Standard Of Review

Defendants argue that the WCAC overstepped its authority to conduct a limited administrative review of the magistrate's decision and instead substituted its interpretation of the evidence. In *Mudel v Great Atlantic & Pacific Tea Co*, the Michigan Supreme Court explained that although the WCAC reviews the magistrate's findings for compliance with the substantial evidence standard in accordance with MCL 418.861a(3),² the judiciary's review of the WCAC's findings is designed to ensure the integrity of the administrative process.³ Thus, if there is any

² MCL 418.861a(3) states as follows:

[F]indings of fact made by a worker's compensation magistrate shall be considered conclusive by the commission if supported by competent, material, and substantial evidence on the whole record. As used in this subsection, "substantial evidence" means such evidence, considering the whole record, as a reasonable mind will accept as adequate to justify the conclusion.

³ *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 701; 614 NW2d 607 (2000).

evidence supporting the WCAC's factual findings, then the courts must treat the WCAC's factual findings as conclusive.⁴ However, the WCAC must not misapprehend its administrative appellate role in reviewing decisions of the magistrate.⁵ In other words, the courts should affirm a decision of the WCAC,

[i]f it appears on judicial appellate review that the WCAC carefully examined the record, was duly cognizant of the deference to be given to the decision of the magistrate, did not "misapprehend or grossly misapply" the substantial evidence standard, and gave an adequate reason grounded in the record for reversing the magistrate[.]^[6]

Misapprehension of its administrative appellate role includes, for example, engaging in de novo review.⁷

B. Applying The Standards

Our review of the WCAC's opinion shows that although it carefully reviewed the record, it afforded little or no any deference to the magistrate's decision and did not conduct the limited review provided by MCL 418.861a(3). Instead of reviewing the magistrate's findings to ensure that they were supported by competent, material, and substantial evidence on the entire record, the WCAC substituted its own assessment and interpretation of the evidence in the record. Although the magistrate relied on Dr. Drouillard's deposition testimony that Krastes currently had no disabling condition, the WCAC discounted and disregarded Dr. Drouillard's testimony based on the notion that since Dr. Drouillard had not examined Krastes during the time she was found to be disabled, he could not *now* give an opinion that her condition had improved to the point where she was no longer disabled. Such reasoning is entirely specious. The magistrate found Krastes disabled in 2002 from a physical injury suffered in 1998. When faced with evidence from 2004 indicating that Krastes was no longer physically impaired, a reasonable mind could certainly conclude that Krastes' prior injury had healed or resolved to the point where she was no longer disabled. Further, the WCAC chose to substitute its interpretation of the videotape evidence for the magistrate's interpretation. Although the magistrate pointed out that the videotape showed Krastes moving her neck and upper body without difficulty, the WCAC instead found significant portions of the videotape which it believed were consistent with an ongoing disability, such as Krastes' slow movement and failure to assist her mother in lifting bags.

In sum, we conclude that the WCAC misapprehended or grossly misapplied its standard of review when it reversed the magistrate's order stopping disability benefits. Instead of

⁴ *Id.* at 709-710.

⁵ *Id.*

⁶ *Id.* at 703, quoting *Holden v Ford Motor Co*, 439 Mich 257, 269; 484 NW2d 227 (1992).

⁷ *Id.* at 703.

reviewing the WCAC's findings under the substantial evidence standard, it impermissibly conducted a de novo review and substituted its own findings for those of the magistrate.

Accordingly, we reverse the WCAC's opinion and order and reinstate the magistrate's order granting defendants' petition to stop payment of benefits.

/s/ Brian K. Zahra

/s/ William C. Whitbeck

/s/ Jane M. Beckering